U.S. Department of Justice

Office of Legislative Affairs



Office of the Assistant Attorney General

*Washington, D.C. 20530*



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MAY 24 2005

Senator Pat Roberts, Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Chairman Roberts:

I write to express the Department of Justice's strong opposition to any attempt to impose an "ascertainment" requirement on the implementation of multi-point or "roving" surveillance conducted under the Foreign Intelligence Surveillance Act (FISA). (U)

As the Members of this Committee are well aware, a roving surveillance order attaches to a particular target rather than to a particular phone or other communications facility. Since 1986, law enforcement has been able to use roving wiretaps to investigate ordinary crimes, including drug offenses and racketeering. Before the USA PATRIOT Act, however, FISA did not include a roving surveillance provision. Therefore, each time a suspect changed communication providers, investigators had to return to the FISA Court for a new order just to change the name of the facility to be monitored and the "specified person" needed to assist in monitoring the wiretap. However, international terrorists and spies are trained to thwart surveillance by regularly changing communication facilities, especially just prior to important meetings or communications. Therefore, without roving surveillance authority, investigators were often left two steps behind sophisticated terrorists and spies. (U)

Thankfully, section 206 of the USA PATRIOT Act ended this problem by providing national security investigators with the authority to obtain roving surveillance orders from the FISA Court. This provision has put investigators in a much better position to counter the actions of spies and terrorists who are trained to thwart



Classified by: James A. Baker, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Department of Justice
Reason: 1.4(c)
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OIPR/USDOJ
Date: 7/9/05

surveillance. This is a tool that we do not use often, but when we use it, it is critical. As of March 30, 2005, it had been used 49 times and has proven effective in monitoring foreign powers and their agents. (U)

Some in Congress have expressed the view that an "ascertainment" requirement should be added to the provisions in FISA relating to "roving" surveillance authority. Section 2 of the S. 737, the Security and Freedom Ensured Act of 2005 ("SAFE Act"), for example, would provide that such surveillance may only be conducted when the presence of the target at a particular facility or place is "ascertained" by the person conducting the surveillance. (U)

Proponents of the SAFE Act have claimed that this provision would simply impose the same requirement on FISA "roving" surveillance orders that pertains to "roving" wiretap orders issued in criminal investigations, but this is wholly inaccurate. The relevant provision of the criminal wiretap statute states that the roving interception of oral communications "shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order." *See* 18 U.S.C. § 2518(12). With respect to the roving interception of wire or electronic communications, however, the criminal wiretap statute imposes a more lenient standard, providing that surveillance can be conducted "only for such time as it is reasonable to presume that [the target of the surveillance] is or was reasonably proximate to the instrument through which such communication will be or was transmitted." *See* 18 U.S.C. § 2518(11)(b)(iv). (U)

Any "ascertainment" requirement, however, whether it is the one contained in the SAFE Act or the one currently contained in the criminal wiretap statute, should not be added to FISA. Any such requirement would deprive national security investigators of necessary flexibility in conducting sensitive surveillance. Due to the different ways in which foreign intelligence surveillance and criminal law enforcement surveillance are conducted as well as the heightened sophistication of terrorists and spies in avoiding detection, provisions from the criminal law cannot simply be imported wholesale into FISA. (U)

Targets of FISA surveillance are often among the most well-trained and sophisticated terrorists and spies in the world. As a result, they generally engage in detailed and extensive counter-surveillance measures. Adding an ascertainment requirement to FISA therefore runs the risk of seriously jeopardizing the Department's ability to effectively conduct surveillance of these targets because, in attempting to comply with such a requirement, agents would run the risk of exposing themselves to sophisticated counter-surveillance efforts. (U)

In addition, an ascertainment requirement is unnecessary in light of the manner in which FISA surveillance is conducted. As the Members of this Committee are no doubt aware, intercepted communications under FISA are often not subject to contemporaneous monitoring but rather are later translated and culled pursuant to court-ordered minimization procedures. These procedures adequately protect the privacy concerns that we believe the proposed ascertainment provisions are intended in part to address. (U)

While we understand the concern that conversations of innocent Americans might be intercepted through roving surveillance under FISA, the Department does not believe that an ascertainment requirement is an appropriate mechanism for addressing this concern. Rather, we believe that the current safeguards contained in FISA along with those procedures required by the FISA Court amply protect the privacy of law-abiding Americans. (U)

First, under section 206, the target of roving surveillance must be identified or described in the order of the FISA Court, and if the target of the surveillance is only described, such description must be sufficiently specific to allow the FISA Court to find probable cause to believe that the specified target is a foreign power or agent of a foreign power. As a result, section 206 is always connected to a particular target of surveillance. Roving surveillance follows a specified target from phone to phone and does not "rove" from target to target. (U)

Second, surveillance under section 206 also can be ordered only after the FISA Court makes a finding that the actions of the specified target may have the effect of thwarting the surveillance (by thwarting the identification of those persons necessary to assist with the implementation of surveillance). (U)

Additionally, all "roving" surveillance orders under FISA must include Court-approved minimization procedures that limit the acquisition, retention, and dissemination by the government of information or communications involving United States persons. These are usually in the form of standard minimization procedures applicable to certain categories of surveillance, but the procedures may be modified in particular circumstances. (U)

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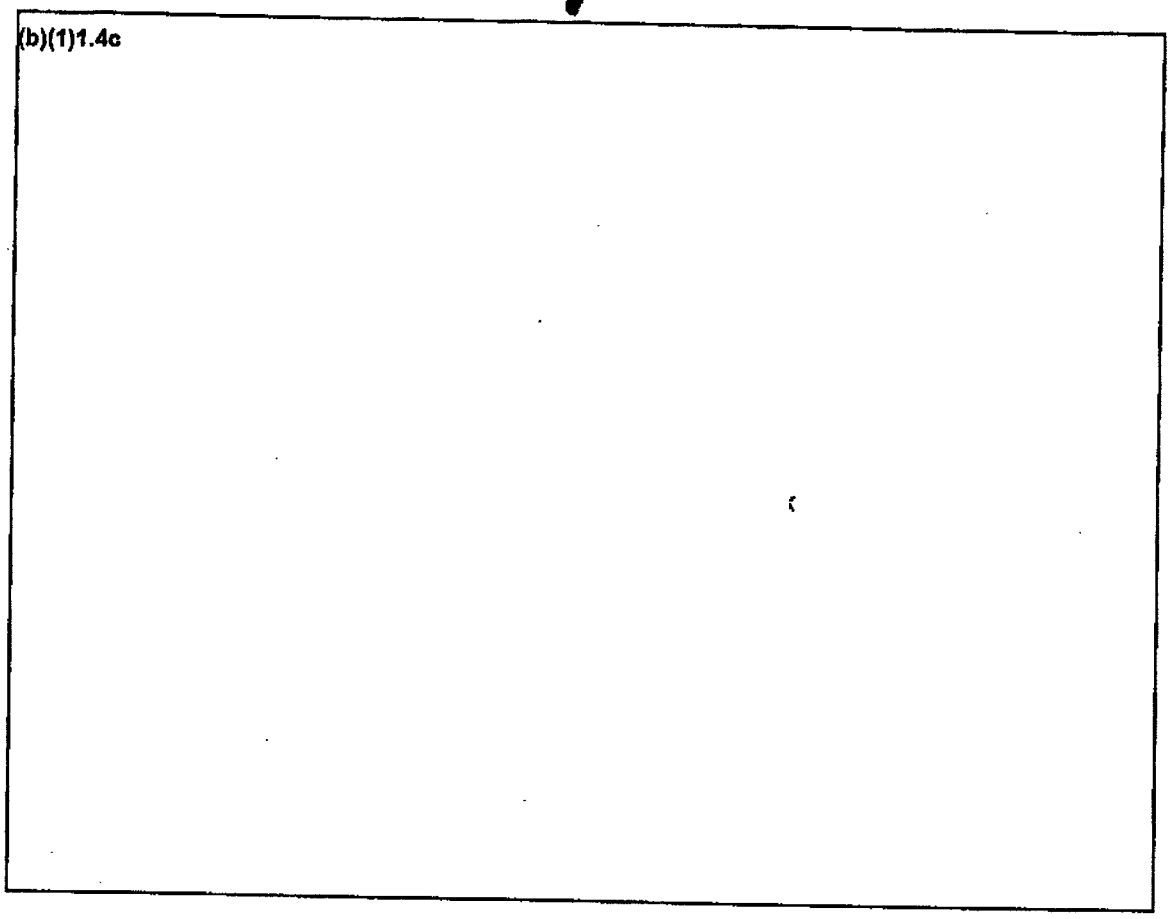

In sum, the Department believes that the safeguards set forth in this letter reflect the appropriate balance between ensuring the effective surveillance of sophisticated foreign powers and their agents and protecting the privacy of the American people. The Department strongly opposes any attempt to disturb this balance by adding an ascertainment requirement to the provisions of FISA relating to roving surveillance authority. (U)

We hope that this information will be useful to the Committee as it considers the reauthorization of those USA PATRIOT Act provisions scheduled to sunset at the end of this year. Please do not hesitate to contact me if you have additional questions or concerns about this issue. (U)

Sincerely,

William E. Moschella

William Moschella
Assistant Attorney General